Rapanos Guidance
June 5, 2007

EPA/COE Guidance for Jurisdictional Determination under CWA

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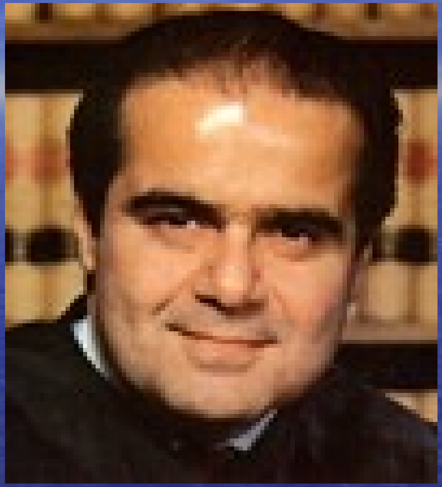
Background

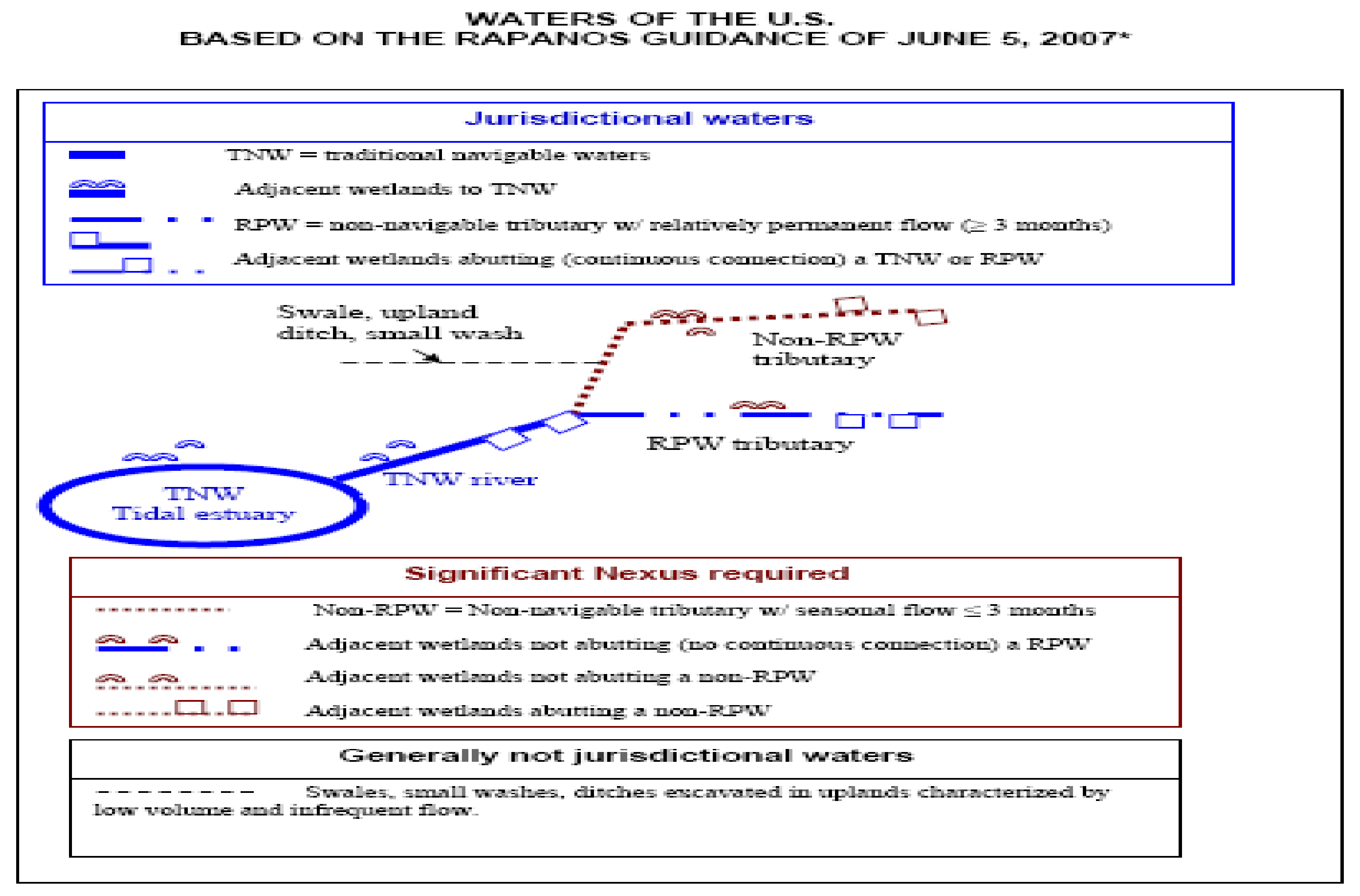
- CWA goal - restore and maintain the chemical, physical and biological integrity of waters.
- Prohibition of discharges of any pollutant including dredged or fill material into waters except in compliance with the CWA.
- Rapanos case addressed where the EPA and COE can apply the CWA specifically by determining whether a tributary or wetland is a water of the US.

The Rapanos Decision



- The plurality concluded that regulatory authority extends only to "relatively permanent, standing or continuously flowing bodies of water" connected to traditional navigable waters and abutting wetlands.
- Justice Kennedy did not join the plurality's opinion entirely, only the remand, but did present a standard of "significant nexus".

Summary of Guidance



WATERS OF THE U.S.
BASED ON THE RAPANOS GUIDANCE OF JUNE 5, 2007*

Jurisdictional waters

TNW = traditional navigable waters

Adjacent wetlands to TNW

RPW = non-navigable tributary w/ relatively permanent flow (≥ 3 months)

Adjacent wetlands abutting (continuous connection) a TNW or RPW

Swale, upland
ditch, small wash
Non-RPW
tributary
RPW tributary
TNW river
TNW
Tidal estuary

Significant Nexus required

Non-RPW = Non-navigable tributary w/ seasonal flow ≤ 3 months

Adjacent wetlands not abutting (no continuous connection) a RPW

Adjacent wetlands not abutting a non-RPW

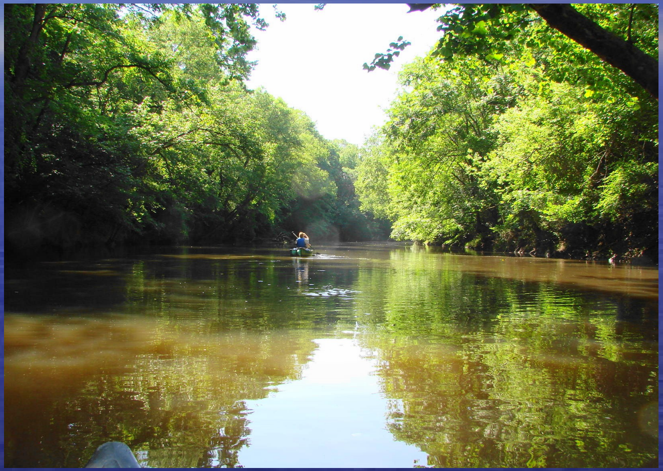
Adjacent wetlands abutting a non-RPW

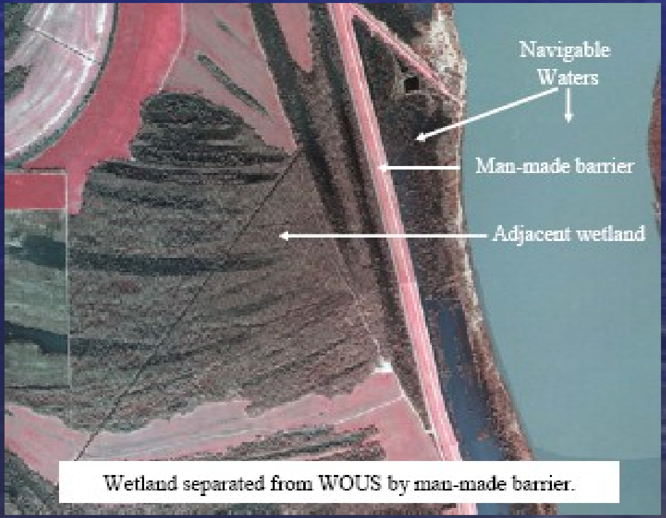
Generally not jurisdictional waters

Swales, small washes, ditches excavated in uplands characterized by low volume and infrequent flow.

1. Traditional Navigable Waters and Their Adjacent Wetlands

- The agencies will assert jurisdiction over traditional navigable waters which includes all the waters described in EPA and COE regulations (33 CFR and 40 CFR).
- The agencies will assert jurisdiction over wetlands adjacent to traditional navigable waters, including adjacent wetlands that do not have continuous surface connection to traditional navigable waters.
- Under agencies regulations “adjacent” means bordering, contiguous or neighboring.





Wetland separated from WOUS by man-made barrier.

2. Relatively Permanent Non-navigable Tributaries of Traditional Navigable Waters and Wetlands with a Continuous Surface Connection with Such Tributaries

- The agencies will assert JD over non-navigable tributaries of TNW that are relatively permanent where the tribs typically flow year-round or have continuous flow at least seasonally (e.g., 3 mos).
- The agencies will assert JD over those adjacent wetlands that have a continuous surface connection to such tribs (e.g., they are not separated by uplands, a berm, dike, or similar feature.)

Relatively Permanent

Continuous Surface Connection

Tributary

- A tributary includes natural, man-altered, or man-made water bodies that carry flow directly or indirectly into a traditional navigable water.
- Furthermore, a tributary, for the purpose of this guidance is the entire reach of the stream that is of the same order (i.e., from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream).

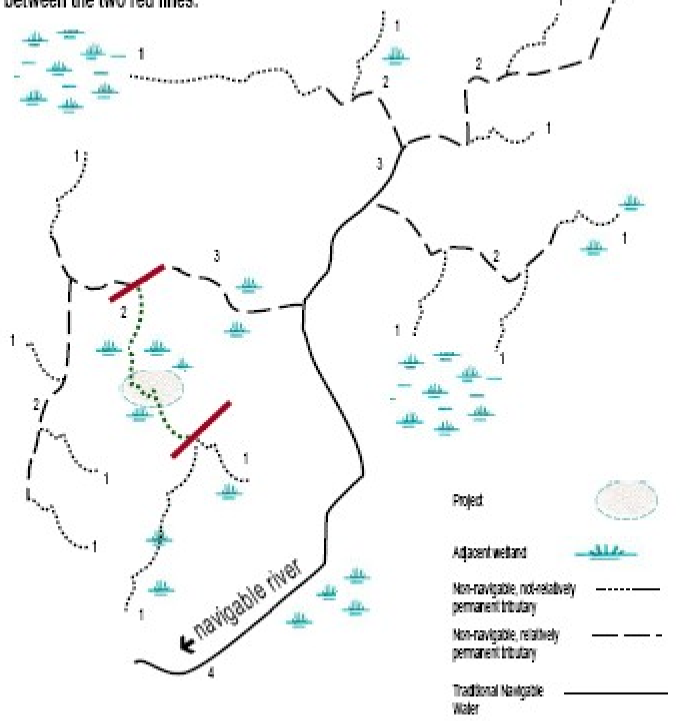
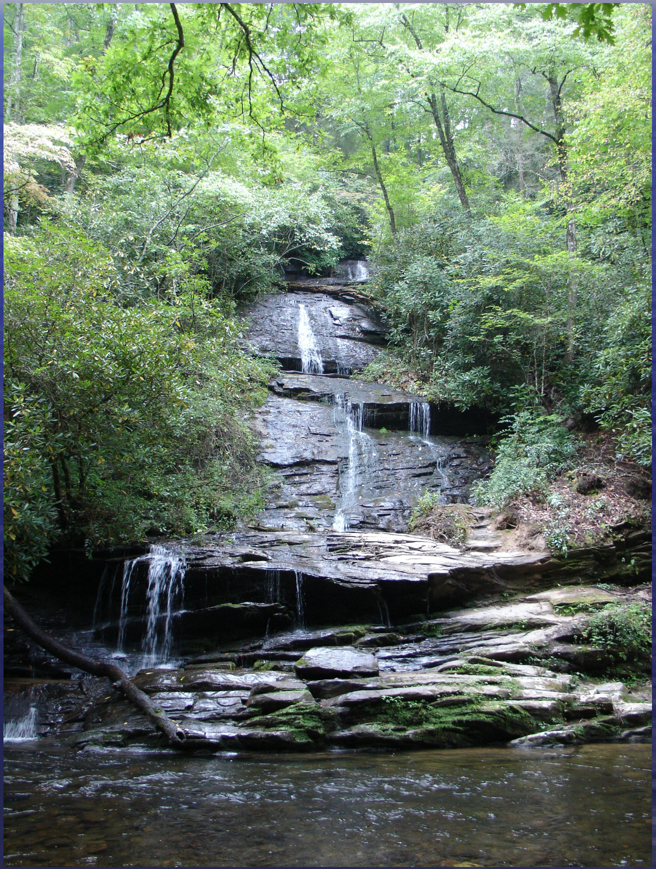


Illustration 6: Project involves wetlands adjacent to a tributary with non-RPWs. The “relevant reach” includes the wetlands and the tributary colored green, which lie between the two red lines.

navigable river
1
2
3
4
Project
Adjacent wetland
Non-navigable, not-relatively permanent tributary
Non-navigable, relatively permanent tributary
Traditional Navigable Water

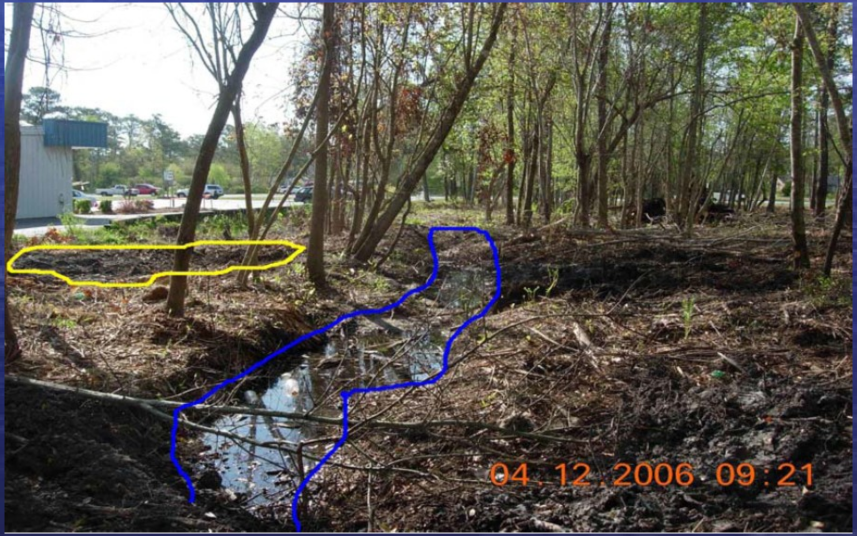
Relatively Permanent Waters

- Typically (e.g., except due to drought) flow year-round or waters that have a continuous flow at least seasonally (e.g., typically three months).
- Generally, does not include ephemeral tributaries and intermittent stream which do not typically flow year-round or have continuous flow at least seasonally.
- Agencies will assert JD without making significant nexus finding.



3. Certain Adjacent Wetlands and Non-navigable Tributaries that are Not Relatively Permanent

- The agencies will assert JD over non-navigable, not RP tributaries and their adjacent wetlands where these waters have significant nexus to TNW.
- Significant nexus analysis will assess flow characteristics and function to determine if these waters significantly affect the chemical, physical and biological integrity of downstream TNW.
- Similarly situated wetlands include all wetlands adjacent to the same tributary.



Not Relatively Permanent & adjacent wetlands

Significant Nexus

- Significant nexus includes consideration of hydrology factors: volume, duration and frequency of flow, physical characteristics of the tributary, proximity to the TNW, size of the watershed, average annual rainfall, average winter snow pack.
- Significant nexus includes consideration of ecological factors: potential of tributaries to carry pollutants and flood waters to TNW, aquatic habitat that supports TNW, potential to trap and filter pollutants or store flood waters, maintenance of WQ in TNW.

Site specific determination

Significant nexus – physical, chemical or biological integrity to Traditional Navigable Water

Organic material & sediment
Carbon production & sequestration

Source function

Sink function

Biological community & primary productivity

Wildlife & Endangered species habitat

Refuge function

Flood storage & storm water treatment

The following geographic features generally are not JD waters: swales or erosional features (gullies, small washes), ditches excavated wholly in and draining uplands with no relatively permanent fl

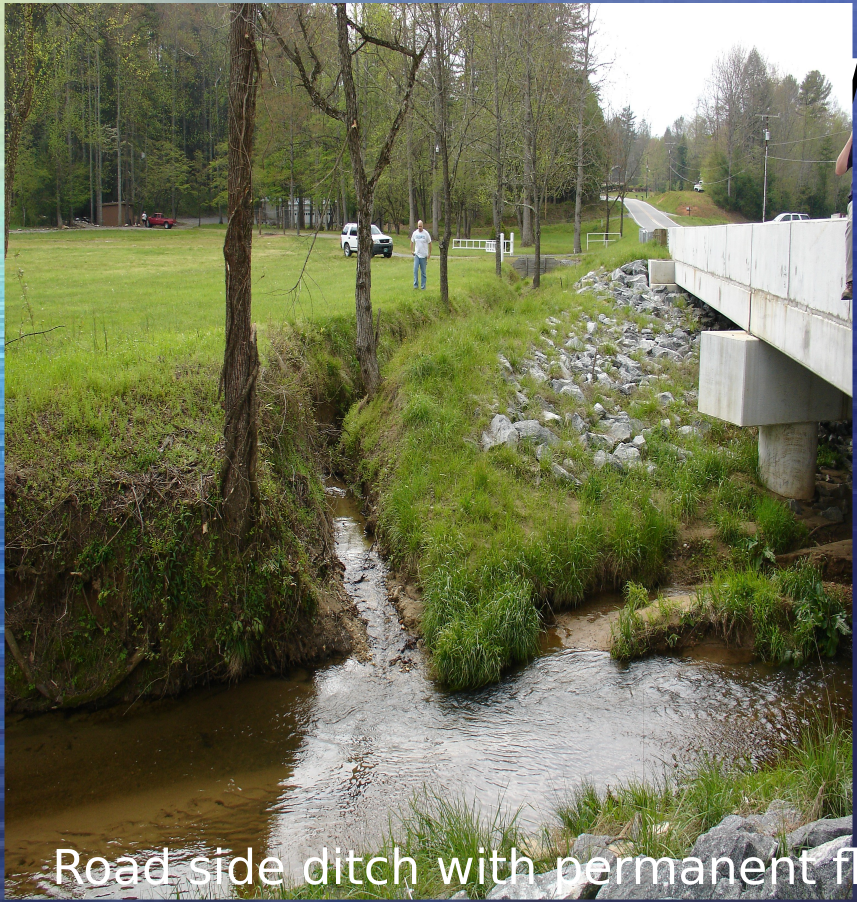
Upland Swales

Erosional features

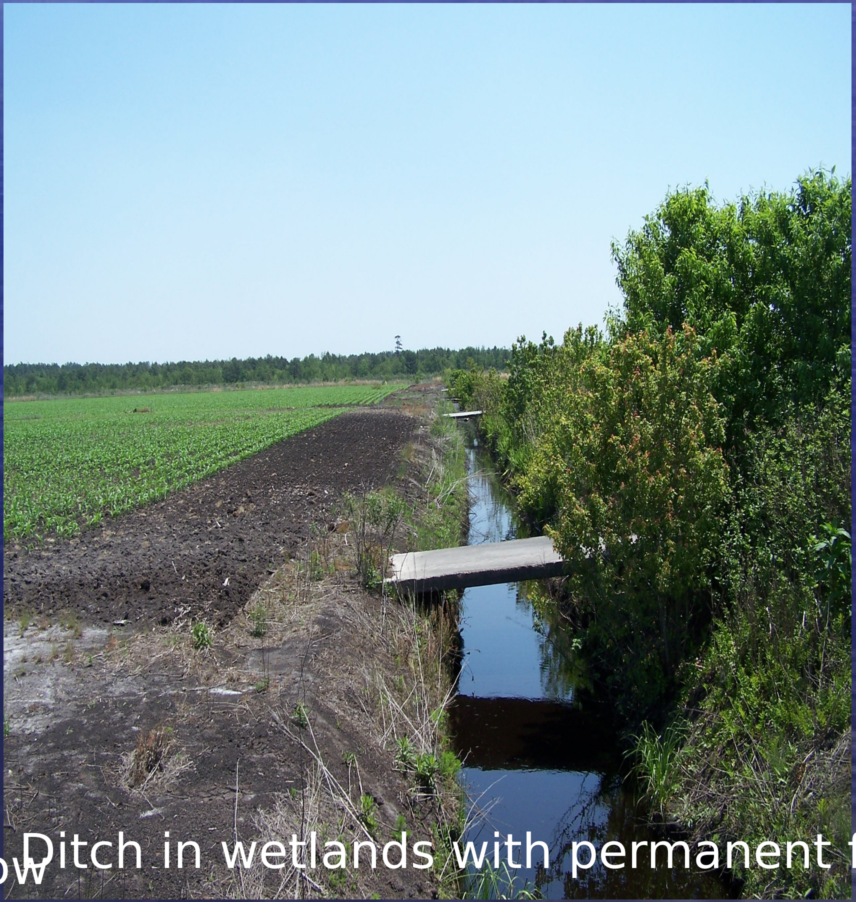
Upland ditch

Road side ditch

Road side ditch with permanent flow & ditch constructed in wetlands with

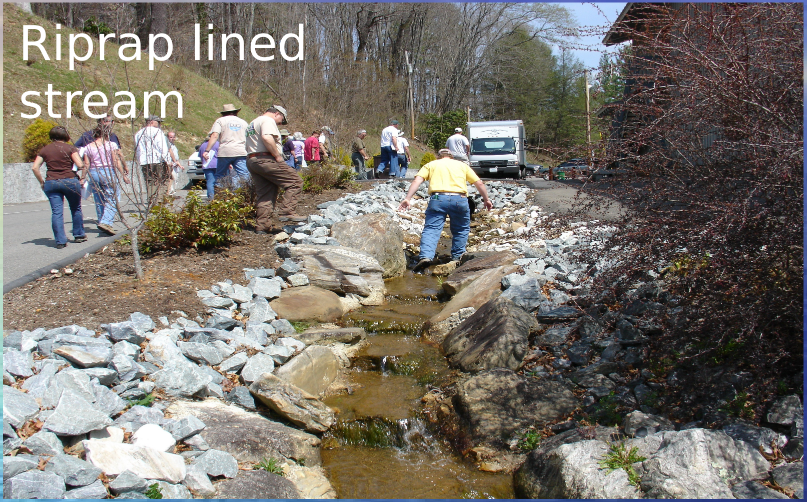


Road side ditch with permanent flow



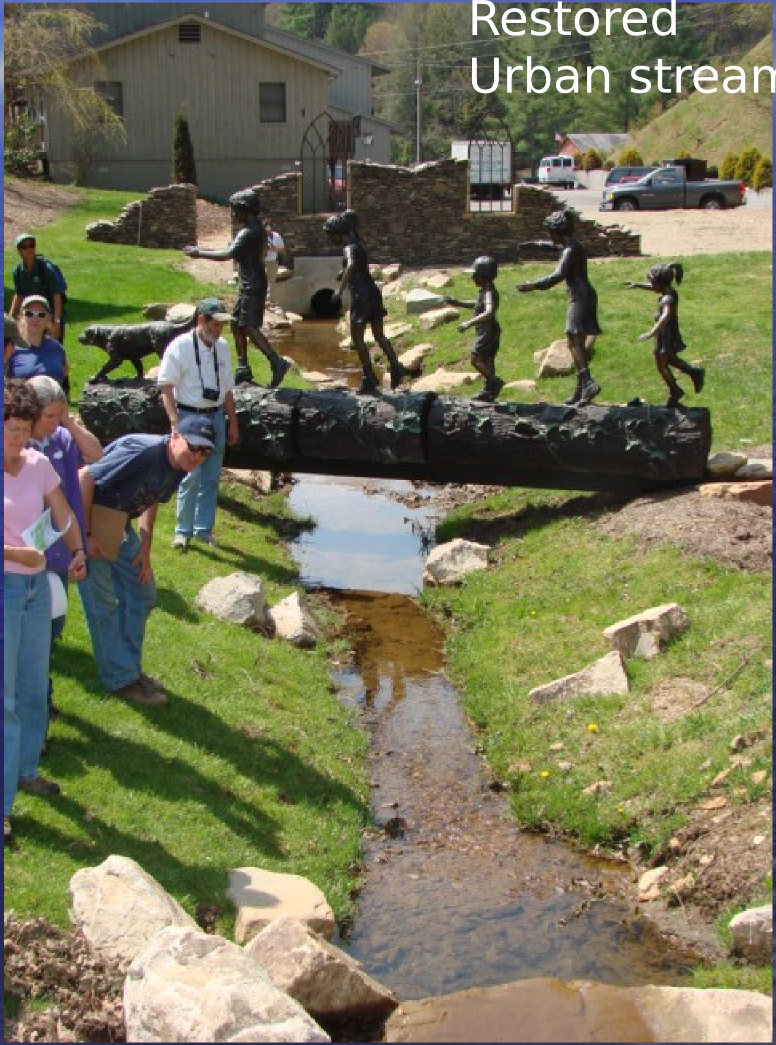
Ditch in wetlands with permanent flow

Urban Tributaries



Riprap lined stream

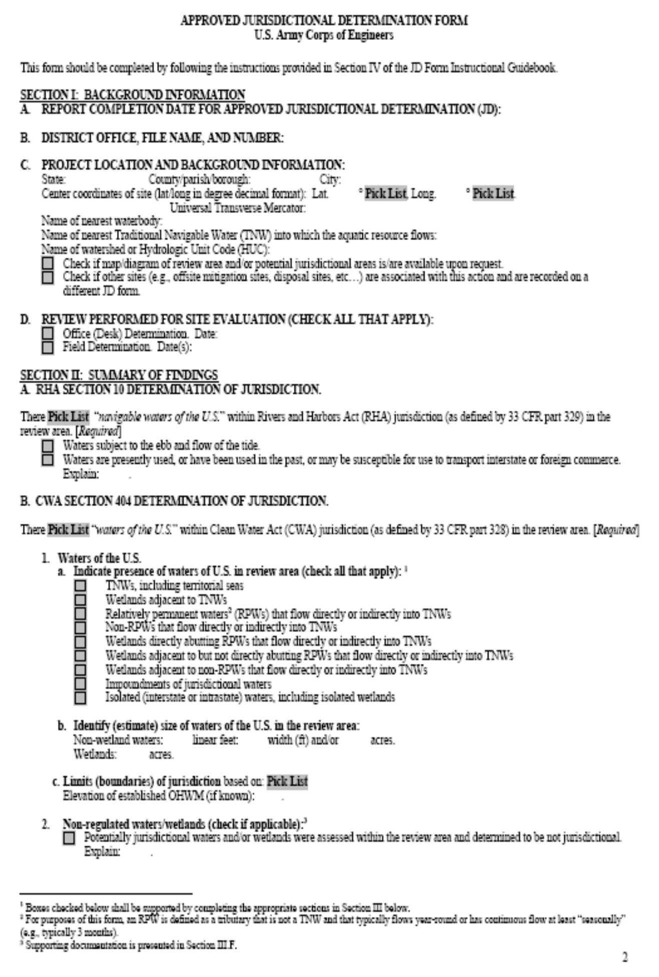
Stream in culvert



Restored Urban stream

Documentation

- The agencies will decide CWA JD over non-navigable tributaries and their adjacent wetlands based on fact specific analysis to determine significant nexus with TNW.
- EPA and COE will ensure information in the record supports any JD.
- The record shall to maximum extent practicable explain the rational, disclose data and information used, and the weight of data used and any best professional judgment or assumptions used in the JD.
- As a matter of policy, significant nexus to TNW will be documented for any non-perennial trib and its adjacent wetlands.
- Maps, aerial photography, soil surveys, watershed studies, local development plans, literature citation, and reference are examples of information.
- The level of documentation depends on the complexity of the projects.



APPROVED JURISDICTIONAL DETERMINATION FORM
U.S. Army Corps of Engineers

This form should be completed by following the instructions provided in Section IV of the JD Form Instructional Guidebook.

SECTION I: BACKGROUND INFORMATION

A. REPORT COMPLETION DATE FOR APPROVED JURISDICTIONAL DETERMINATION (JD):

B. DISTRICT OFFICE, FILE NAME, AND NUMBER:

C. PROJECT LOCATION AND BACKGROUND INFORMATION:
State: County/parish/borough: City:
Center coordinates of site (lat/long in degree decimal format): Lat. ° Pick List, Long. ° Pick List.
Universal Transverse Mercator:
Name of nearest waterbody:
Name of nearest Traditional Navigable Water (TNW) into which the aquatic resource flows:
Name of watershed or Hydrologic Unit Code (HUC):
☐ Check if map/diagram of review area and/or potential jurisdictional areas is/are available upon request.
☐ Check if other sites (e.g., offsite mitigation sites, disposal sites, etc…) are associated with this action and are recorded on a different JD form.

D. REVIEW PERFORMED FOR SITE EVALUATION (CHECK ALL THAT APPLY):
☐ Office (Desk) Determination. Date:
☐ Field Determination. Date(s):

SECTION II: SUMMARY OF FINDINGS

A. RHA SECTION 10 DETERMINATION OF JURISDICTION.

There Pick List *"navigable waters of the U.S."* within Rivers and Harbors Act (RHA) jurisdiction (as defined by 33 CFR part 329) in the review area. [*Required*]
☐ Waters subject to the ebb and flow of the tide.
☐ Waters are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.
Explain: .

B. CWA SECTION 404 DETERMINATION OF JURISDICTION.

There Pick List *"waters of the U.S."* within Clean Water Act (CWA) jurisdiction (as defined by 33 CFR part 328) in the review area. [*Required*]

1. **Waters of the U.S.**
   a. **Indicate presence of waters of U.S. in review area (check all that apply):** [1]
      ☐ TNWs, including territorial seas
      ☐ Wetlands adjacent to TNWs
      ☐ Relatively permanent waters[2] (RPWs) that flow directly or indirectly into TNWs
      ☐ Non-RPWs that flow directly or indirectly into TNWs
      ☐ Wetlands directly abutting RPWs that flow directly or indirectly into TNWs
      ☐ Wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs
      ☐ Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs
      ☐ Impoundments of jurisdictional waters
      ☐ Isolated (interstate or intrastate) waters, including isolated wetlands

   b. **Identify (estimate) size of waters of the U.S. in the review area:**
      Non-wetland waters: linear feet: width (ft) and/or acres.
      Wetlands: acres.

   c. **Limits (boundaries) of jurisdiction** based on: Pick List
      Elevation of established OHWM (if known): .

2. **Non-regulated waters/wetlands (check if applicable):**[3]
   ☐ Potentially jurisdictional waters and/or wetlands were assessed within the review area and determined to be not jurisdictional.
   Explain: .

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[1] Boxes checked below shall be supported by completing the appropriate sections in Section III below.
[2] For purposes of this form, an RPW is defined as a tributary that is not a TNW and that typically flows year-round or has continuous flow at least "seasonally" (e.g., typically 3 months).
[3] Supporting documentation is presented in Section III.F.

Interagency coordination

- Joint EPA/COE memo issued June 5, 2007 which required interagency coordination of CWA 404 jurisdictional determination by the COE.
- Interagency coordination is not required for JDs involving traditional navigable waters including their adjacent wetlands and for relatively permanent non-navigable tributaries of traditional navigable waters, including wetlands with continuous surface connections with relatively permanent tribs.
- Interagency coordination is required for intra-state, non-navigable, isolated waters JDs asserted based on interstate factors and JDs based on findings of a “significant nexus”.
- EPA region has 15 days to review and RA may elevate. RA and DE then have 10 days to resolve JDs. If elevated to HQ, HQ will initiate review within 5 days, and if mutual agreement is reached within 14 days then issue joint guidance. If HQ agreement not reached EPA will issue memo with determination within 21 days.
- JDs are appealable actions under COE appeal process.

Public comment and information

- During the first 6 months implementing the guidance, the agencies will invite public comments on case studies and experience applying the guidance.
- Within 9 months the agencies will reissue, revise or suspend the guidance.
- The agencies intend to more broadly consider jurisdictional issues through rule making or other appropriate policy practices.
- Information may be found at http://www.epa.gov/owow/wetlands or http://www.usace.army.mil/cw/cecwo/reg/

Questions?

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